Charle @ Charlie bin Donatus v Azmie bin Kassim (a minor suing by his father and next of friend Kassim bin Abu Bakar)

HIGH COURT (MIRI) — CIVIL APPEAL NO MYY-12B-9/12 OF 2011
STEPHEN CHUNG J
22 JUNE 2012

Tort — Road accident — Claim for damages — Appeal from sessions court — Collision between pillion rider of motorcycle and motor vehicle — Assessment of damages — Whether awards excessive — Whether trial judge erred in award — Appeal against general damages

The plaintiff, the pillion rider of a motorcycle, was involved in an accident with the defendant who was driving a motor vehicle and in the sessions court, the defendant was held liable for the accident. The damages were assessed and judgment was entered for the plaintiff in the sum of RM103,279. In the present appeal, the defendant submitted that the awards of RM45,000 for the fracture and RM15,000 for the two scars were excessive. It was argued that the trial judge had erred in awarding RM15,000 to the plaintiff for early osteoarthritis as according to evidence, the plaintiff had only 10% chance of developing osteoarthritis and this could be assessed about six months after the injury. An assessment made one year after the injury showed no sign of osteoarthritis. The defendant further argued that since there was no sign of osteoarthritis one year after the injury, it was not necessary to carry out the ankle joint replacement which would cost RM25,000 in a private hospital. On the other hand, the plaintiff submitted that the fracture was to two bones and the plaintiff had in fact claimed RM50,000 for the fracture. It was submitted that the two scars were permanent and unsightly which the plaintiff had to bear for the rest of his life and the awards of RM45,000 and RM15,000 were fair and reasonable based on the trends of award. The trial judge awarded the sum of RM45,000 for the closed fracture bimalleolar of the left ankle joint. In respect of the scars, the trial judge said that the scars were apparent and deep. The trial judge held that that from the authorities the awards ranged from RM10,000 to RM15,000 and he believed that RM15,000 would not be on the high side. After considering the medical reports, it was held that there were chances of the plaintiff developing osteoarthritis at a later stage in life as a result of the accident. The defendant appealed the general damages awarded to the plaintiff.

Held, allowing the appeal:

(1) Based on the authorities, an award of RM10,000 would be fair and

reasonable for the scars sustained by the plaintiff. The trial judge had erred in awarding the sum of RM15,000. On the award of RM15,000 for premature osteoarthritis, although there was then no evidence of osteoarthritis of the ankle joint, the injury to the left ankle joint would have future consequences to the function of the joint. In the medical report, it was stated that the plaintiff would develop premature osteoarthritis compared to the right ankle. There was no other medical evidence to the contrary. The trial judge was correct in awarding the sum of RM15,000 for the premature osteoarthritis (see paras 12–13).

(2) On the costs of future operations, based on the grounds given, the trial judge had erred. The plaintiff must first prove that he was justified in seeking treatment at a private hospital and that the treatment was not available in the government hospital. The trial judge did not consider these factors. The award was for the costs of future operations and not for operations carried out. There was no evidence that the treatments were not available in government hospitals in the future or at the material time when the plaintiff requires such treatments. There was no evidence that the plaintiff's osteoarthritis would become intolerable and requires joint replacement or fusion of the joint. The plaintiff would require surgery to remove the ankle implants. Therefore the award was reduced to RM5,000 for costs of future operations (see para 14).

[Bahasa Malaysia summary

Plaintif, pembonceng motosikal, telah terlibat dalam kemalangan dengan defendan yang memandu kenderaan motor dan dalam mahkamah sesyen, defendan telah diputuskan bertanggungjawab untuk kemalangan itu. Ganti rugi telah ditaksirkan dan penghakiman telah dimasuki untuk plaintif bagi jumlah RM103,279. Dalam rayuan ini, defendan berhujah bahawa award RM45,000 untuk patah tulang dan RM15,000 untuk dua parut adalah melampau. Dihujahkan bahawa hakim perbicaraan terkhilaf dalam mengawardkan RM15,000 kepada plaintif untuk osteoartristis awal sebagaimana menurut keterangan, plaintif hanya mempunyai peluang sebanyak 10% untuk mendapat osteoarthritis dan ini boleh dinilai lebih kurang enam bulan selepas kecederaan. Penilaian dibuat setahun selepas kecederaan tidak menunjukkan tanda osteoartritis. Defendan selanjutnya berhujah oleh kerana tiada tanda osteoarthritis setahun selepas kecederaan, adalah tidak perlu untuk menjalankan gantian sendi buku lali kaki yang berjumlah RM25,000 di hospital swasta. Sebaliknya, plaintif berhujah bahawa tulang patah itu adalah terhadap dua tulang dan plaintif sebenarnya menuntut RM50,000 untuk tulang patah tersebut. Adalah dihujahkan bahawa dua kesan parut itu adalah kekal dan jelas yang mana plaintif perlu ditanggung seumur hidupnya dan award-award RM45,000 dan RM15,000 adalah adil dan munasabah berdasarkan trend award. Hakim perbicaraan mengawardkan jumlah RM45,000 untuk tulang patah tertutup bimalleolar di sebelah kiri

A sendi buku lali kaki. Berhubung parut-parut tersebut, hakim perbicaraan menyatakan bahawa parut-parut tersebut adalah jelas dan dalam. Hakim perbicaraan memutuskan bahawa berdasarkan autoriti-autoriti award-award adalah sekitar RM10,000 hingga RM15,000 dan beliau percaya bahawa RM15,000 tidak terlalu tinggi. Setelah mempertimbangkan laporan-laporan B perubatan, adalah diputuskan bahawa terdapat peluang untuk plaintif mendapat osteoarthritis di peringkat umur meningkat dalam hidup akibat kemalangan itu. Defendan merayu terhadap ganti rugi yang diawardkan kepada plaintif.

C **Diputuskan**, membenarkan rayuan:

(1) Berdasarkan autoriti, award RM10,000 adalah adil dan munasabah untuk parut yang dialami oleh plaintif. Hakim perbicaraan terkhilaf memberi award berjumlah RM15,000. Berdasarkan award RM15,000 D untuk osteoarthritis pramatang, meskipun belum terdapat bukti osteoarthritis pada sendi buku lali, kecederaan kepada sendi buku lali kiri mempunyai akibat masa hadapan kepada fungsi sendi itu. Dalam laporan perubatan, ada dinyatakan bahawa plaintif akan mengalami osteoarthritis pramatang berbanding dengan buku lali kanan. Tiada bukti perubatan lain yang bertentangan. Hakim perbicaraan adalah betul E dalam memberi award berjumlah RM15,000 untuk osteoarthritis pramatang (lihat perenggan 12–13).

(2) Berhubung kos pembedahan masa depan, berdasarkan alasan yang diberikan, hakim perbicaraan telah terkhilaf. Plaintif hendaklah F pertamanya membuktikan adalah wajar baginya mendapat rawatan di hospital swasta dan bahawa rawatan itu tidak terdapat di hospital kerajaan. Hakim perbicaraan tidak mengambil kira faktor-faktor tersebut. Award tersebut adalah untuk kos pembedahan masa depan dan bukan untuk pembedahan yang dijalankan. Tiada bukti bahawa G rawatan-rawatan tersebut tidak terdapat di hospital kerajaan di masa depan atau pada masa matan apabila plaintif memerlukan rawatan sedemikian. Tiada bukti bahawa osteoarthritis plaintif tidak boleh ditanggung dan memerlukan gantian sendi atau gabungan pada sendi. Plaintif akan memerlukan pembedahan untuk mengeluarkan *implant* H buku lali kaki itu. Oleh itu award tersebut dikurangkan kepada RM5,000 untuk kos pembedahan masa depan (lihat perenggan 14).]

Notes

For a case on claim for damages, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) I para 1939.

Cases referred to

Chai Yee Chong v Lew Thai [2004] 2 MLJ 465, CA (refd)
Ismail b Najib v So Chai Ling & Anor [2010] 2 PIR [56] (refd)

Kanniappan a/l Andy v Lim Ah Soi [2011] 2 PIR [19] (refd)
Lim Su Im v Jaimi b Mungkilas 7 Ors [2010] 1 PIR [13] (refd)
Mahmood bin Kailan v Goh Seng Choon & Anor [1976] 2 MLJ 239, FC (refd)
Mohd Al Mu'min b Shamsudin v Selamah bt Jamal & Anor [2008] 2 PIR [9] (refd)
Mohd Fala b Anuar & Anor v Guanalan a/l Mariappen & Anor [2011] 1 PIR [18] (refd)
Mohd Khairul Hafiz b Abdul Gaffar & Anor v Zahari b Chan & Anor [2007] 1 PIR [37] (refd)
Mohd Rafik b Garip v Husin b Salleh [2009] 1 PIR [29] (refd)
Razak b Mamat v Baharun b Mohamed Noor & Anor [2007] 1 PIR [23] (refd)
Razali b Kamsian v Kok Kah Chee [2011] 2 PIR [64] (refd)
Salamat (Selamat) b Abu Bakar v Fuzi b Othman & Anor [2009] 2 PIR [9] (refd)
S Perumal a/l Shanmugam v Hee Chek Chung [2009] 2 PIR [8] (refd)
Sumber b Dollah & Anor v Yeo Ngee Chiang & Anor [2008] 1 PIR [28] (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22; [1985] 1 CLJ 429, SC (refd)
United Plywood and Sawmill Ltd v Lock Ngan Loi [1970] 2 MLJ 237, FC (refd)

Sunny Si (Si & Associates) for the appellant.
Sheikh Rajjish (Shad & Partners Advocates) for the respondent.

Stephen Chung J:

RULING

[1] The plaintiff was the pillion rider on a motorcycle which was involved in an accident with a motor vehicle driven by the defendant. The driver of the motorcycle was not a party to the action. After a trial, the sessions court found the defendant responsible for the accident, assessed the damages and entered judgment for the plaintiff in the aggregate sum of RM103,279. This is the defendant's appeal against the quantum of damages awarded by the sessions court.

[2] From the grounds of appeal and submissions of learned counsel for the defendant, the defendant is not appealing against the special damages awarded to the plaintiff in the sum of RM3,279. Therefore, this appeal is only in respect of the general damages awarded to the plaintiff. The general damages awarded were as follows:

1.	Closed fracture bimalleolar of the left ankle joint — two bones	RM45,000
2.	Two scars	RM15,000
3.	Premature osteoarthritis	RM15,000
4.	Costs of future operation	RM25,000
		RM100,000

[3] An Appellate Court is always slow to interfere with the trial judge's findings and award of damages. The Appellate Court can only interfere if it is satisfied that the trial judge has acted on a wrong principle of law or that he has misapprehended the facts or he has made a wholly erroneous estimate of the damages suffered: *Mahmood bin Kailan v Goh Seng Choon & Anor* [1976] 2 MLJ 239, *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22; [1985] 1 CLJ 429. If the assessment is inordinately low or inordinately high or if it is so much out of line with the discernible trend or pattern of awards in reasonably comparable cases, then the assessment may be regarded as a wholly erroneous estimate: *United Plywood and Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237.

[4] The defendant submitted that the awards of RM45,000 for the fracture and RM15,000 for the two scars were clearly excessive having regards to the several recent awards handed down by other courts for similar injuries and therefore were without any basis. The defendant submitted that the trial judge had erred to award RM15,000 for early osteoarthritis because based on Dr Richard Chen's evidence, the plaintiff has only a 10% chance of developing osteoarthritis and this could be assessed about six months after the injury. It was submitted that when Dr Chen made the assessment one year after the injury, he concluded that there was no sign of osteoarthritis. It was also submitted that since there was no sign of osteoarthritis one year after the injury, there was no necessity to carry out the ankle joint replacement which would cost RM25,000 in a private hospital.

[5] The plaintiff submitted that the trial judge did not misdirect himself because based on evidence of the two doctors, the fracture was to two bones and the plaintiff had in fact claimed RM50,000 for the fracture. It was submitted that the two scars are permanent and unsightly which the plaintiff has to bear for the rest of his life. It was submitted that the awards of RM45,000 and RM15,000 given by the court were fair and reasonable based on the trends of award and that the court had also taken overlapping factors into account in making the awards. The plaintiff's counsel did not agree with the defendant's counsel submissions on the osteoarthritis and on the costs of the future operations. It was submitted that the plaintiff was entitled to the best medical treatment available.

[6] The trial judge in his grounds of decision said that 'this is not just a simple case of two fractures but it is a case of two bone injuries'. He then said that he had considered all case authorities submitted by counsel of both parties and he awarded the sum of RM45,000 for the closed fracture bimalleolar of the left ankle joint. In respect of the scars, he said that the scars were apparent and deep. He said that from the authorities the awards ranged from RM10,000–RM15,000 and he believed that RM15,000 would not be on the high side.

[7] The trial judge, after considering the medical reports, came to a finding that there were chances of the plaintiff developing osteoarthritis at a later stage in life as a result of the accident. He said that it would be simply wishful but unwise to conclude that there would not be any osteoarthritis just because the signs did not occur after a year. He accordingly awarded the sum of RM15,000 for premature osteoarthritis.

[8] With regards to the costs of future operations, the trial judge said that it was recommended by Dr Richard Chen. The trial judge then commented that the plaintiff coming from the 'humble and down trodden' category might not receive as much attentive and personal quality treatment in government hospitals compared to private hospitals. For these reasons, he awarded the sum of RM25,000 for the costs of future operations in a private hospital.

[9] The plaintiff was 17 years old and was a student at the time of the accident. The medical report of the plaintiff prepared by Hospital Miri showed that he was admitted to the hospital on 13 December 2009 following the accident and was diagnosed with a close fracture bimalleolar of the left ankle joint. He was treated with open reduction and plating of the fibula, screw fixation of the medical (which should read as medial) malleolus and syndesmotic fixation of the tibia. The medical report stated that the recovery was progressing well and he was discharged on 17 December 2009.

[10] The plaintiff was examined by Dr Richard Chen, an orthopaedic surgeon, on 14 December 2010 for the purpose of preparing a medical report. On examination, Dr Chen found the plaintiff to walk with an antalgic limping gait, the left ankle was swollen and the circumference of the left ankle was 33cm compared to 35cm for the right ankle. There were two long scars on the medial and lateral aspect of the left ankle which measured 10cm and 15cm respectively. The scars corresponded to the incision scars made for the treatment of the fracture. There was no obvious muscle wasting. The x-ray showed the fracture was healing with good alignment. It also showed a syndesmotic screw which should have been removed earlier. The medical report stated that the ankle pain, swelling and stiffness were due to the presence of the implant on the left ankle and would resolve on removal of the implant. It stated that it would cost RM4,000 to be removed in his clinic. It also stated that there was no evidence of osteoarthritis of the ankle joint.

[11] The cases cited by the parties in respect of the closed fracture bimalleolar of left ankle are as follows. In *Salamat (Selamat) b Abu Bakar v Fuzi b Othman & Anor* [2009] 2 PIR [9], the court awarded RM18,000 for a fracture of the left medial and lateral malleolus. The award was RM20,000 for the fracture of the lateral and medial malleolus of the right ankle with a malunion thereto in *Kanniappan a/l Andy v Lim Ah Soi* [2011] 2 PIR [19]. In

Razali b Kamsian v Kok Kah Chee [2011] 2 PIR [64], the award was RM27,000 for a crack fracture of right lateral malleolus and fracture of third right tibia with muscle wasting and mulunion of the crack fracture. In *Razak b Mamat v Baharun b Mohamed Noor & Anor* [2007] 1 PIR [23], the court awarded RM32,000 for a closed fracture bimalleolar of left tibia. In *Mohd Rafik b Garip v Husin b Salleh* [2009] 1 PIR [29], the award was RM30,000 for a closed fracture of the left lateral malleolus with disabilities and sensory deficit. In *S Perumal a/l Shanmugam v Hee Chek Chung* [2009] 2 PIR [8], the award was RM25,000 for a closed fracture of the right medial malleolus. In *Sumber b Dollah & Anor v Yeo Ngee Chiang & Anor* [2008] 1 PIR [28], the award was RM18,000 for a closed fracture of the left medial malleolus. Reading the authorities cited, an award of RM25,000 would be fair and reasonable and the trial judge had erred in awarding the sum of RM45,000.

[12] The cases cited by the parties in support of the award for the scars are as follows. In *Lim Su Im v Jaimi b Mungkilas 7 Ors* [2010] 1 PIR [13], RM2,000 was awarded for a 14cm scar over the right shoulder. In *Ismail b Najib v So Chai Ling & Anor* [2010] 2 PIR [56], RM5,000 was awarded for a 7cm scar over the left ilac crest, 10cm x 0.5cm operative scar over the ventral aspect of the left lower forearm, 13.5cm x 1.5cm operative scar over the anterior aspect of the left knee, 19.5cm healed scar over the posterior aspect of the left hip, 21cm operative scar over the left greater trochanter extendin to the left buttock and two healed pin hole scars over the lower 1/3 of the left thigh. In *Mohd Fala b Anuar & Anor v Guanalan a/l Mariappen & Anor* [2011] 1 PIR [18], an award of RM5,000 was given for 1.5cm long hyperpigmented pin track scar over right inner elbow, 4cm long hyperpigmented operate scar over right wrist, 20cm x 35cm long hypopigmented operative scar over the right elbow and four hyperpigmented operative scars measuring 3cm, 4.5cm, 6.5cm and 7.5cm over right foot. In *Mohd Rafik b Garip v Husin b Salleh* [2009] 1 PIR [29], the award was RM10,000 for multiple scars to the knee, hand and shoulder. In *Mohd Al Mu'min b Shamsudin v Selamah bt Jamal & Anor* [2008] 2 PIR [9], the award was RM 10,000 for a 17cm x 3cm scar over the anterolateral lower third of the right leg. In *Mohd Khairul Hafiz b Abdul Gaffar & Anor v Zahari b Chan & Anor* [2007] 1 PIR [37], the award was RM10,000 for a 10cm x 2cm scar with adhesions over anterior aspect of the left thigh and a 19cm x 3cm operation scar over lateral aspect of the left thigh. Based on the authorities, an award of RM10,000 would be fair and reasonable for the scars sustained by the plaintiff. The trial judge had erred in awarding the sum of RM15,000.

[13] On the award of RM15,000 for premature osteoarthritis, although Dr Chen said that there was then no evidence of osteoarthritis of the ankle joint, he said that the injury to the left ankle joint would have future consequences to the function of the joint. In para 25 of his medical report, he stated that the plaintiff 'will develop premature osteoarthritis' compared to the right ankle.

There was no other medical evidence to the contrary. The trial judge was correct in awarding the sum of RM15,000 for the premature osteoarthritis.

[14] On the costs of future operations, based on the grounds given, the trial judge had erred. The plaintiff must first prove that he is justified in seeking treatment at a private hospital and that the treatment is not available in the government hospital: *Chai Yee Chong v Lew Thai* [2004] 2 MLJ 465. The trial judge did not consider these factors. The award was for the costs of future operations and not for operations carried out. There was no evidence that the treatments are not available in government hospitals in the future or at the material time when the plaintiff requires such treatments. There was no evidence that the plaintiff's osteoarthritis will become intolerable and requires joint replacement or fusion of the joint. The plaintiff will require surgery to remove the ankle implants. Therefore the award is reduced to RM5,000 for costs of future operations.

[15] The appeal against quantum is, to the extent stated above, allowed. Each party to bear their own costs in this appeal.

Appeal allowed.

Reported by Ibnu Aswan